

***United States Court of Appeals
for the Second Circuit***



TRANSCRIPT

75-2137

TRANSCRIPT

1 DHD
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 UNITED STATES OF AMERICA, ex rel.
6 JOHN KELLEHER,

7 Petitioner,

8 -versus-

74 Civ. 4837

9 ROBERT J. HENDERSON, Superintendent,
10 Auburn Correctional Facility,

11 Respondent.

12 -----X
13
14 New York, New York
15 April 17, 1975
16 2:00 p.m.

17 Before:

18 Hon. HENRY F. WERKER,

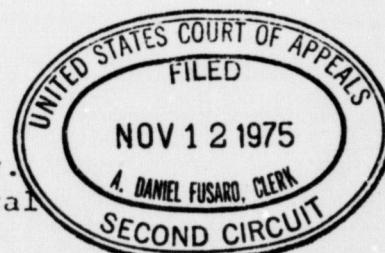
19 District Judge.

20 Appearances:

21 ELKAN ABRAMOWITZ, Esq.
22 Attorney for Petitioner

23 LOUIS J. LEFKOWITZ, Esq.
24 Attorney General of the
25 State of New York

By: ARLENE R. SILVERMAN, Esq.
24 Assistant Attorney General



2 THE CLERK: United States of America ex rel.

3 John Kelleher v. Robert J. Henderson, Superintendent,
4 Auburn Correctional Facility.

5 Petitioner ready?

6 MR. ABRAMOWITZ: Petitioner ready.

7 MS. SILVERMAN: Respondent ready, your Honor.

8 Before Mr. Abramowitz calls any witnesses, I
9 would just like to make a motion that I have reviewed all
10 the papers here, and particularly the only application that
11 Mr. Kelleher filed in the state court prior to his appli-
12 cation here, and I have been unable to find any allegation
13 or any claim that his attorney promised him a 15-year
14 sentence.

15 And in view of that fact I would ask the Court
16 to dismiss the application on the ground petitioner has
17 failed to exhaust his state remedies.

18 MR. ABRAMOWITZ: Your Honor, I think
19 Ms. Silverman misconstrues the nature of the claim. The
20 claim is that the petitioner did not understand, at the
21 time he took his plea, the full import of the sentence, to
22 wit, the maximum or minimum sentence, not that he was
23 promised a sentence and received something in addition to
24 the promise.

25 THE COURT: I agree.

2 MS. SILVERMAN: I do not think that is an
3 accurate representation.

4 THE COURT: I think it is an accurate repre-
5 sentation.

6 MS. SILVERMAN: I have the petition right in
7 front of me, and particularly it states --

8 MR. ABRAMOWITZ: I think we can clear what
9 Ms. Silverman is going to talk about, what is the papers,
10 we can clear that up with the testimony, your Honor.

11 THE COURT: Let me say it this way: There has
12 been a motion. The petitioner was here, we had a motion
13 for a reargument, and now we are being slightly repetitious.
14 The motion is denied.

15 Call your first witness.

16 MR. ABRAMOWITZ: Before I call the first witness,
17 I just wanted some clarification from your Honor's opinion
18 of January 20th.

19 Your Honor listed four issues that you wanted to
20 be covered, I think, by both a legal and a factual hearing.
21 We are prepared today to cover factually number three, which
22 was a question as to whether the petitioner, either through
23 the court proceedings, his counsel or other independent
24 source, was aware of the full range of sentences.

25 With respect to issue number one, which deals

2 with exhaustion, and I believe issue number two, which also
3 deals with exhaustion, we would ask permission after the
4 hearing to file a post-hearing memorandum on those issues
5 with the benefit of testimony today.

6 THE COURT: I think the purpose of this hearing
7 today is to get the factual issue straightened out and see
8 what evidence you can produce. Thereafter, both sides can
9 submit memorandums.

10 MR. ABRAMOWITZ: Very well.

11 The petitioner calls Richard Ferguson, your
12 Honor.

13 R I C H A R D J. F E R G U S O N, called as a
14 witness on behalf of the petitioner, being first duly
15 sworn, testified as follows:

16 MR. ABRAMOWITZ: May I inquire, your Honor?

17 THE COURT: Yes, you may.

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18 DIRECT EXAMINATION

19 BY MR. ABRAMOWITZ:

20 Q Mr. Ferguson, could you please try to keep your
21 voice up so that everybody in the courtroom can hear your
22 responses to my questions.

23 A Yes.

24 Q What is your occupation?

25 A I'm a lawyer.

2 Q How long have you been a lawyer?

3 A I've been a lawyer since 1936.

4 Q Are you admitted to practice in the State of
5 New York?

6 A Yes, I am.

7 Q Any other courts that you are admitted in?

8 A Well, I'm admitted in the Southern District and
9 the Eastern District of the Federal Court.

10 Q Mr. Ferguson, do you know a John Kelleher?

11 A Yes, I do.

12 Q Do you see him in the courtroom?

13 A Yes, I do.

14 Q Would you please point him out.

15 A It's the gentleman sitting over there
16 (indicating).

17 MR. ABRAMOWITZ: May the record reflect that
18 Mr. Ferguson identified Mr. Kelleher.

19 Q Mr. Ferguson, when did you meet Mr. Kelleher?

20 A I met Mr. Kelleher in the latter part of
21 November 1971.

22 Q In what connection did you meet him?

23 A I was assigned by the Appellate Division to
24 handle the trial of his case, which was then pending in the
25 New York Supreme Court.

2 Q Do you remember when, in relation to the begin-
3 ning of the trial, you met him, or how many days before the
4 trial began?

5 A I met him approximately 15 to 20 days before the
6 start of the trial.

7 Q. At that time, during your first conversation
8 with Mr. Kelleher, did you discuss the possibility of a plea
9 of guilty to that indictment in which he was named?

10 A I don't believe I did.

11 Q Isn't it true that at that time Mr. Kelleher
12 wished to go to trial and proceed with the defense of that
13 indictment?

14 A That was what he told me, yes.

15 Q Did you have occasion to speak with
16 Mr. Kelleher at any other time prior to the beginning of the
17 trial?

18 A Yes, I did. The Assistant District Attorney at
19 the time in charge of the prosecution, a Mr. Cryan, had said
20 that he would offer a plea to the defendant if he wished to
21 take it, which would be a minimum of six years and a maximum
22 of 18 years, and I spoke to the defendant about it and he
23 wouldn't accept it.

24 Q Did there come a time when the trial against
25 Mr. Kelleher proceeded?

2 A Yes.

3 Q Without going into the details of the trial,
4 Mr. Ferguson, did there come a time when Mr. Kelleher
5 decided to plead guilty?

6 A Yes, he did.

7 Q Could you tell us when during the course of the
8 trial, if you remember, Mr. Kelleher communicated to you
9 that wish?

10 A Well, at the end of the prosecution's case,
11 when the People rested, at that time the defendant surprised
12 me by saying that he wished to plead guilty.

13 Q What did you do when he said that to you?

14 A I asked the Judge, Judge Stark, if we could
15 approach the bench, and I approached the bench with
16 Mr. Cryan, the District Attorney, and I informed the Judge
17 that the defendant had said he wanted to plead guilty.

18 Q By the way, Mr. Ferguson, do you recall what the
19 charge was against Mr. Kelleher in that indictment?

20 A It was attempted murder and possession of a
21 weapon.

22 Q After these conversations with the Judge and the
23 District Attorney, did you have a conversation with
24 Mr. Kelleher?

25 A Yes, I did.

2 Q . Would you tell the Court, as best you can recall,
3 what that conversation was.

4 A I told Mr. Kelleher that the Judge said that in
5 view of the fact that he was pleading guilty, even though
6 part of the trial had taken place, though still part of it
7 was unfinished, that he deserved consideration, and that he
8 would give the defendant consideration in imposing sentence.

9 And there was some question about the fact that
10 the Judge was in charge of the sentence and not the District
11 Attorney, and the Judge made that perfectly clear and he
12 wanted the defendant to know that, that he was in charge of
13 imposing the sentence and that he would give the defendant
14 consideration for pleading guilty at that time.

15 Q . Did you tell Mr. Kelleher what the Judge had
16 said?

17 A I told him exactly what he said.

18 Q During the course of this conversation, or any
19 other one that you may have had with Mr. Kelleher, did you
20 have an occasion to tell him what the minimum or maximum
21 sentence could be for the crime of attempted murder?

22 A I never discussed that with him.

23 Q After Mr. Kelleher entered the plea, did you
24 have any further conversations with him concerning his
25 sentence?

2 A Well, I had a conference with him to get his
3 background, which I intended to incorporate into my statement
4 at the time of sentence.

5 Q During the course of obtaining Mr. Kelleher's
6 background, did you occasion to tell him what the
7 minimum or maximum sentence could be?

#2 8 MS. SILVERMAN: Objection, your Honor I think
9 the witness should tell us what he remembers rather than
10 Mr. Abramowitz asking some leading questions.

11 THE COURT: I would say so.

12 MR. ABRAMOWITZ: The question is withdrawn.

13 I also believe it was covered in the earlier question.

14 THE COURT: I do not know that it was, no.

15 Q Is that all there was to that conversation that
16 you had with Mr. Kelleher?

17 A The only -- well, that was substantially what
18 I discussed with him.

19 Q Then did there come a time, Mr. Ferguson, when
20 Mr. Kelleher was sentenced; do you recall that?

21 A Yes.

22 Q Did you have any conversation with Mr. Kelleher
23 prior to the sentence or after the actual court proceeding
24 in which you had any discussion about the minimum or the
25 maximum sentence that could have been imposed for the crime

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Ferguson-direct

10

2 of attempted murder?

3 A As I said before, I did not discuss that with
4 him.

5 MR. ABRAMOWITZ: I have no further questions,
6 your Honor.

7 MS. SILVERMAN: May I inquire, your Honor?

8 THE COURT: Yes, you may.

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9 CROSS-EXAMINATION

10 BY MS. SILVERMAN:

11 Q Mr. Ferguson, you said you were admitted to the
12 bar in 1936. Have you any particular area of specialization
13 in the law?

14 A I'm a general practitioner, but I do mainly
15 criminal work.

16 Q When did you first begin doing criminal work,
17 in 1936?

18 A I've done criminal work over the years. I
19 couldn't pinpoint the exact date.

20 Q Could you give us an estimate of the percentage
21 of your cases that are criminal cases?

22 A Approximately 50 percent.

23 Q Half. Half of your work is in the criminal law
24 area?

25 A Yes.

2 Q Is that in the state courts or the federal
3 courts?

4 A State courts.

5 Q Primarily --

6 A State courts mainly.

7 Q Over the years then, since 1936, could you tell
8 me approximately how many defendants you have represented
9 in criminal matters?

10 A That's a long period of time. I don't --

11 Q Too many to remember, though?

12 A It's quite a few, I would say.

13 Q You said that you came to represent the
14 petitioner 15 to 20 days, as you recall, before the start
15 of the trial, having been appointed by the Appellate
16 Division?

17 A Yes. He had had other attorneys.

18 Q Oh, he had.

19 A And I was called in the last minute, so to speak,
20 by the Appellate Division and asked if I would be willing to
21 try the case.

22 Q Were you told by the Appellate Division why you
23 were called in at the last minute or, as you put it, the
24 last minute?

25 A No.

2 Q This was an indictment, as you pointed out, for
3 attempted murder. Had you represented, prior to this time,
4 any defendants on murder charges, homicide charges?

5 A Maybe a few.

6 Q So this was not your first homicide case?

7 A No.

8 Q So you first came into this case 15 to 20 days
9 before the start of the trial. When did you first meet the
10 defendant and where?

11 A I believe that I went to the Tombs to speak to
12 him.

13 Q You did. That would be the fifteenth or
14 twentieth day before the trial began?

15 A Approximately, yes.

16 Q What did you speak with him about on that occasion,
17 Mr. Ferguson?

18 A Well, I spoke to him about the background of the
19 case so that I would prepare myself to try the case for him.

20 Q Did you speak about witnesses or alibis or what
21 in particular did you speak of?

22 A I can't recall exactly what I asked him, but I
23 tried to cover as much as I could.

24 Q As a result of that conversation, did you do
25 anything at that time?

2 A Well, I made a motion, an omnibus motion, to get
3 a bill of particulars and there were included also motions
4 to suppress and motions regarding identification.

5 Q What was the outcome of those motions?

6 MR. AERAMOWITZ: Your Honor, I think that is
7 irrelevant. I object.

8 THE COURT: Oh, I think it is background. I
9 will let him answer that.

10 A I got some information regarding a bill of
11 particulars, as I recall, and then the Judge directed us to
12 go right to trial within a couple of days.

13 Q Was there a suppression hearing in this case or
14 your motion was denied?

15 A There was a motion -- the only hearing that I
16 recall was a Wade hearing regarding identification.

17 Q Did you conduct that Wade hearing on behalf of
18 the defendant?

19 A I conducted that hearing, yes.

20 Q How many days did that hearing last, if you
21 recall?

22 A I don't recall. I think it took no more than
23 a few hours. In fact, I think it directly proceeded to
24 trial.

25 Q During this entire period I take it you had the

2 defendant with you and he was present and you were talking
3 to him?

4 A He was present in court, of course.

5 Q Did you at any time discuss this indictment with
6 him in this case, discuss the indictment?

7 A Well, I discussed the charge with him.

8 Q What did you particularly discuss in connection
9 with the charge, Mr. Ferguson?

10 MR. ABRAMOWITZ: Your Honor, I have to object
11 to that, and I am not sure that the petitioner wishes to
12 waive the attorney-client privilege as to any communication
13 he may have had with Mr. Ferguson concerning the merits of
14 the case or the substance of the case.

15 MS. SILVERMAN: Well, your Honor, I would
16 simply submit that Mr. Kelleher has already waived the
17 attorney-client privilege insofar as he may be retried. I
18 suppose he could raise it at that time. I certainly think
19 for purposes of this hearing that is what we are here about.

20 MR. ABRAMOWITZ: We are not here to decide the
21 merits of the case at all.

22 THE COURT: I do not really think it is relevant.

23 MS. SILVERMAN: Your Honor, I asked him what he
24 discussed in connection with the indictment. It seems to
25 me the sentence, possible time he faced, is quite relevant.

2 THE COURT: Let us confine it to sentence.

3 Q What did you discuss in connection with the
4 indictment with respect to sentence?

5 A I talked to him purely about the trial of the
6 case. Since the case was then about six or seven months old,
7 and since I had been asked to come in to try the case, that
8 was my objective. I wasn't directing myself towards
9 obtaining any pleas for him or discussing any pleas with him.

10 Q You said that Mr. Kelleher indicated to you that
11 he wanted to go to trial?

12 A Yes.

13 Q So that he never asked you what the maximum
14 possible sentence was that he faced if he went to trial?

15 A That's right.

16 Q You said there came a time when Mr. Cryan
17 offered a plea in this matter, in this case?

18 A That was before the trial, yes.

19 Q At what point? How far in advance of the trial?

20 A Well, there was only a short period of time
21 before I came into it and before it went to trial. Possibly
22 a week or a couple of days before the trial. I can't say
23 exactly.

24 Q What was the plea that Mr. Cryan offered?

25 A He specified a particular plea.

2 Q What was that plea?

3 A Covering the years, a minimum of six and a
4 maximum of 18.

5 Q But what was the plea? What was the charge that
6 he was going to plead to?

7 A I am not sure exactly what the plea was.

8 Q Do you have a file?

9 A What?

10 Q I'm sorry. Please finish. I did not mean to
11 interrupt.

12 A It was possibly a C felony or a B felony. I
13 can't say exactly.

14 Q You have a good recollection of this case, though?

15 A I have a pretty good recollection of the trial
16 of the case, the portion that was completed, yes.

17 Q Do you know what a defendant today can get for
18 the maximum on a C felony?

19 A At that time?

20 Q At that time. It was 1971, wasn't it?

21 A I believe it was 15 years.

22 Q Do you know what a defendant could get for a
23 B felony?

24 A Up to 25 years.

25 Q So if he offered six to 18, then what --

2 A He probably had requested a plea to a B felony,
3 then.

4 Q Now, if he requested a plea to a B felony, then
5 in the context of this case, what felony would that have
6 been?

7 A That would have been the crime that was charged.

8 Q So it would have been a plea to the indictment
9 or to at least the first count of the indictment?

10 A Yes.

11 Q When Mr. Cryan made you this offer, what did
12 you do?

13 A I spoke to Mr. Kelleher. I said, "Do you want
14 to take a plea where you'll be sentenced from six to 18
15 years?"

16 And he said, "Absolutely not."

17 Q Did he ask you what the plea would be to?

18 A No.

19 Q Could you remember more specifically what
20 exactly did you say to him and what exactly did he say to you?

21 MR. ABRAMOWITZ: I object to the form of the
22 question.

23 A I just mentioned that.

24 MR. ABRAMOWITZ: I do not think that Mr. Ferguson
25 was unspecific in his answer at all.

2 MS. SILVERMAN: I thought it was a general one-
3 sentence --

4 THE COURT: Wait a minute. I overrule it. It
5 is their cross-examination.

6 THE WITNESS: What is the question?

7 THE COURT: Read it back to him, please.

8 (Question read.)

9 A I told him that the District Attorney wanted him
10 to plead to a minimum of six years, a maximum of 18, and
11 would he accept it.

12 And he said no, he didn't want to take it.

13 Q Did he indicate that he thought that after con-
14 viction, if he indicated anything, that he could get less or
15 more?

16 A He didn't say anything about that.

17 Q Did you indicate that it was a plea that would
18 indicate some sort of consideration rather than going to
19 trial?

20 A Well, frankly, at the time I didn't think it
21 represented too much consideration, so I didn't say that.

22 Q Why didn't you think that?

23 A Because of various reasons. Because I considered
24 it a very harsh sentence and I felt that there was a pos-
25 sibility he could win the case.

2 Q . But that certainly was below the minimum; in
3 other words, you just testified that a B felony, that if he
4 had been convicted of the B felony for which he was indicted,
5 he faced a maximum term of 25 years, so in offering 18 years,
6 this was somewhat substantially reduced?

7 A It was below the maximum, but you asked me my
8 opinion.

9 Q Yes, and I am not asking you anything different
10 now. I am asking you, isn't it a fact that 18 years is
11 something less than 25 years, which is what you testified
12 was the exposure on a B felony?

13 A Of course. Arithmetically it is less.

14 Q Did you then speak with Mr. Cryan after you
15 spoke with the defendant?

16 A Yes, I told him he didn't want to take it.

17 Q Then, I take it, the trial began?

18 A It began very shortly after that.

19 Q At what point did Mr. Kelleher indicate to you
20 that he wanted to take a plea?

21 A It was at the conclusion of the People's case.

22 Q What did he say to you specifically, as best you
23 can remember?

24 A He said he wanted to plead guilty.

25 Q At that time did he ask you what the sentence was.

2 if he pleaded guilty, or what the --

3 A Not at all.

4 Q He did not say anything to you?

5 A No.

6 Q I assume that you have spoken to Mr. Abramowitz.

7 Have you recently seen the affidavit that you gave to
8 Mr. Kelleher in connection with his state coram nobis pro-
9 ceeding?

10 A I have seen it, yes.

11 MS. SILVERMAN: This affidavit was submitted to
12 the Court by Mr. Ferguson. I would just like to read a
13 paragraph from that affidavit. It says:

14 "At the point in trial when the defendant
15 changed his plea to guilty, he obviously expected more
16 consideration from the Court and a lesser sentence than he
17 received."

18 Q Why did you say that, Mr. Ferguson? You said
19 that you had not discussed any sentence with him, so I do not
20 understand how you could know that he was going to receive
21 less or that he expected more consideration.

22 A Well, because the Judge had said to me, and I
23 repeated the conversation to him, that the sentence was
24 within his province, not that of the District Attorney, who
25 had been requesting previously six to 18; that the sentence

2 time was within the province of the Judge, and he was going
3 to give him consideration because he was taking a plea at
4 this time.

5 Q But when you say -- I am sorry.

6 A And I assume that he felt that the Judge was
7 going to give him some kind of a break for taking a plea.

8 Q A break from what, Mr. Ferguson? That is what
9 I want to know. A break from what?

10 A I don't know exactly from what. Possibly maybe
11 less than what the District Attorney had offered him.

12 Q So when you wrote this affidavit, you were not
13 quite clear what you meant?

14 A I was perfectly clear.

15 Q You say, "obviously expected more consideration
16 from the Court and a lesser sentence than he received."
17 Well, what sentence did you think that he thought he was
18 going to receive?

19 A That's in his mind, not mine. I don't know
20 what was in his mind.

21 Q He did not write this, Mr. Ferguson, you did.
22 So you obviously had some thought in your mind as to what he
23 was going to expect.

24 A Because the sentence that was imposed obviously
25 was much greater than he anticipated. That's why he's going

2 through all these proceedings.

3 Q You say that the sentence he imposed was
4 obviously much greater. What did he say to you after the
5 sentence was imposed? What did he say to you?

6 A After the sentence was imposed?

7 Q Yes. What did he say to you?

8 A He says -- I don't recall the exact words, but
9 he said it was a terrible blow to him and he was going to
10 fight it all the way.

11 Q Did you ask him any questions when that was said?

12 A I told him I would file a notice of appeal for
13 him, and I did.

14 Q You did not ask him what he meant by a blow?

15 A Well, he felt he expected greater consideration.

16 Q But at some point he knew that 18 was in the
17 ballpark, because that is what the District Attorney had
18 offered him; isn't that true?

19 A He knew it was in the District Attorney's ball-
20 park.

21 Q But I mean, I gather you did not tell him that
22 that would be an illegal sentence?

23 A I didn't say that to him.

24 Q No, you did not say that. And it would not have
25 been an illegal sentence, would it have, Mr. Ferguson?

2 A Of course not.

3 Q So 18 was then in the ballpark; I mean, it was
4 a permissible sentence and certainly at that point he knew
5 18 was a possibility?

6 A He was throwing himself at the mercy of the
7 Judge, not the District Attorney.

8 Q I did not ask you that, Mr. Ferguson. I asked
9 you that he knew that 18 was certainly an exposure, in other
10 words, a possible sentence that he might receive?

11 A I don't know that.

12 Q Did you tell him that Mr. Cryan had offered him
13 six to 18 years?

14 A I already said that.

15 Q So then he knew?

16 MR. ABRAMOWITZ: I object.

17 A He knew that Mr. Cryan had offered it.

18 Q But you did not tell him not to worry because
19 that was not a possibility?

20 A I didn't tell him that, but he was at the mercy
21 of the Judge, not the District Attorney.

22 Q I do not know what you mean by mercy, but the
23 point is, when you discussed this plea negotiation, you had
24 not even spoken to the Judge yet?

25 A I didn't discuss a plea negotiation.

2 #4 Q Well, you did speak with Mr. Cryan about a plea,
3 a possible plea, in this case?

4 A But there was no negotiation.

5 Q Well, then I withdraw the term "negotiation."
6 I meant you did speak with him about a possible plea.

7 Now, he did get 21 years; isn't that correct?

8 A Yes.

9 Q So at most, then, he got three years more than he
10 already knew from what you had told him that he could expect
11 even if he got a plea prior to going to trial?

12 MR. ABRAMOWITZ: I object to the form of the
13 question. There is no testimony that Mr. Kelleher expected
14 18 years.

15 THE COURT: I will sustain the objection.

16 Q In any event, he only got three years more than
17 you had told him that the District Attorney was willing to
18 offer him?

19 A But I will repeat, I must repeat, that he felt
20 he was no longer at the mercy of the District Attorney, but
21 it was the determination of the Judge. Not the District
22 Attorney.

23 Q At any point during your conferences with the
24 defendant, did he ask you what the maximum term was that he
25 faced?

2 A No, he did not.

3 Q He never asked you?

4 A No.

5 Q You say in your affidavit here that "prior to
6 the trial a plea was offered by the Assistant District
7 Attorney, Frank M. Cryan, of a sentence of a minimum of six
8 years and a maximum of 18. The offer was rejected by the
9 defendant."

10 You go on to say then that "other discussions of
11 a possible plea took place before the bench, during which
12 affirmant," that being you, "mentioned the similarity of
13 the crime charged with the crime of assault, and that a
14 possible sentence might be similar to that for assault."

15 So, in other words, there were other plea dis-
16 cussions, I take it, Mr. Ferguson, since this is what you
17 stated in your affidavit?

18 MR. ABRAMOWITZ: Also stated on direct. I
19 object to the form of the question. These are conversations
20 between Mr. Ferguson and the Judge.

21 Q In any event, Mr. Ferguson, what were those
22 other plea negotiations that you mention in this affidavit?

23 A The plea negotiations were simply that I asked
24 the Judge, who called us up to the bench from time to time
25 during the course of the trial, if he could not possibly

2 consider if, there was going to be an imposition of sentence
3 or a plea that this crime of attempted murder was identical
4 to that of assault in the first degree, and that he might
5 consider imposing a sentence in line with assault in the
6 first degree.

7 But the District Attorney wouldn't think of it.

8 Q Why did you make such a request? What was the
9 purpose of that request?

10 A Because the Judge called us up from time to time,
11 and I felt it was my obligation to discuss it.

12 Q But, I mean, how would your client have benefited
13 by such a move? In other words, you had obviously a benefit
14 in mind, did you not, if such an arrangement could be worked
15 out with the District Attorney?

16 A Well, it wasn't up to me to take a plea, but
17 since I was called up and since we had a discussion, I brought
18 up the subject, and if it had been okayed by the Judge, I
19 then would have discussed --

20 Q You then brought up what subject, Mr. Ferguson?

21 A The similarity of attempted murder and assault
22 in the first degree.

23 Q What did you bring up in conjunction therewith?
24 I mean, what was the benefit? Why were you looking for such
25 a plea?

2 A Because the sentence that could be imposed under
3 assault in the first degree was a maximum of 15 years, and
4 for attempted murder it was a maximum of 25 years.

5 Q Exactly, Mr. Ferguson. So you were trying to
6 get a plea for the 15-year or the C felony, right?

7 A I wasn't affirmatively seeking the plea. I
8 merely brought up the subject when I was called up to the
9 bench.

10 Q But that is in fact what you brought up, though,
11 when the plea discussion, or what happened before the Judge,
12 took place? You were pushing for the C felony, i.e., the
13 maximum 15-year term; is that correct?

14 A I wasn't pushing for it. I merely suggested it.

15 Q All right. You suggested it, though,
16 Mr. Ferguson?

17 A Yes.

18 Q How many times, how many discussions such as
19 these were there about the C felony?

20 A I think there was only one, and then at the time
21 of sentence I brought it up again.

22 Q At the time of sentence. Now, with respect to
23 that second time, where did that take place, that discussion
24 about the C felony?

25 A I made a plea for clemency when he was being

2 sentenced. .

3 Q No, I meant the first time, then. I am sorry.

4 I was confused.

5 A Where did it take place?

6 Q Yes.

7 A It took place before the bench.

8 Q Was that before the trial began or after?

9 A No, it was during the course of the trial, I
10 believe.

11 Q After that discussion with the Judge, did you
12 discuss anything with your client concerning this suggestion
13 that you had made?

14 A I don't think so.

15 Q You mean to tell me, Mr. Ferguson, that you
16 brought up a suggestion for a plea to a C felony which
17 carried a considerable lesser penalty, i.e., 25 years to 15
18 years, and you never mentioned this to your client?

19 A There was no point in mentioning it, because
20 the District Attorney wouldn't go for it.

21 Q Well, what was the point in your mentioning it
22 if your client would not have gone for it?

23 A And neither did the Judge.

24 Q What was the point in mentioning it, though,
25 Mr. Ferguson, if your client would not have gone for it?

2 A It's quite obvious. If they had gone along with
3 it, then I would have brought it to Mr. Kelleher's attention
4 and he then could have given it some thought.

5 Q So you mean to tell me, as an attorney who has
6 been practicing since 1936, that you had a plea negotiation
7 or a plea discussion, if you will, with the Judge and the
8 Assistant District Attorney in court and your client was
9 sitting there and you never mentioned anything about it to
10 your client?

11 MR. ABRAMOWITZ: Your Honor, I object to the
12 form of the question as argumentative, and he did mention
13 something about it to his client as he testified.

14 THE COURT: I do not think he has so testified.
15 I will sustain the objection on the ground that it is
16 repetitious.

17 Q Prior to the time of sentence, did you then
18 discuss, at any point between the plea and the sentence, time
19 of sentence, the maximum or minimum penalty for the B felony?

20 MR. ABRAMOWITZ: Object as asked and answered,
21 your Honor.

22 THE COURT: I will let him answer it once more.

23 A I did not discuss that with him.

24 Q Well, you said that you spoke with your client
25 in order to ascertain his background so that you could make a

2 possible, I suppose, speech for him when his sentence came?

3 A Right.

4 Q But during that time didn't you tell him that
5 you would try and see if there was something you could do
6 for him in the way of sentencing?

7 A Well, I was going to say everything good in his
8 favor that I could. And that's what I did.

9 Q In his state coram nobis application,
10 Mr. Kelleher states that you told him that when the Judge
11 imposed the 21-year -- excuse me -- when he took his plea
12 and the Judge said to him that "you understand there are
13 no promises made by your attorney, by the Court or by the
14 District Attorney" that you told him that he was supposed to
15 say "that's right, your Honor?" Did you tell him that?

16 A I told him to say that?

#5 17 Q Yes. He says in his state coram nobis application
18 that you told him that when the Judge asked him if
19 any promises had been made, he was to say no.

20 A I said to him that the Judge, at the time of
21 taking a plea, usually looks for affirmative answers to
22 every question he puts to him.

23 Q Did you tell him to tell the Judge that nobody
24 had made any promises to him?

25 A I don't know whether I -- I knew that I didn't

2 tell him any promises, so there was nothing I could say
3 otherwise. There were no promises except that there would
4 be consideration.

5 Q Just consideration?

6 A That's right.

7 Q Which he did in fact receive?

8 MR. ABRAMOWITZ: Your Honor, this has nothing
9 to do with our claim.

10 THE COURT: No, I agree. I sustain the
11 objection to that question.

12 Q After the date of sentence, when sentence was
13 imposed on Mr. Kelleher, when did you first hear from him
14 or did you hear from him at any time subsequent to the
15 imposition of sentence?

16 I know you gave him an affidavit, so I assume
17 you heard from him.

18 MR. ABRAMOWITZ: I must object as being
19 irrelevant. We are talking about what Mr. Kelleher knew
20 at the time he took the plea.

21 MS. SILVERMAN: Your Honor, I think it is quite
22 relevant, because I think if Mr. Kelleher had in fact
23 thought he had been treated unjustly, he would have taken
24 certain steps to rectify the situation. I think when he
25 got in touch with his attorney, how soon is certainly

2 relevant.

3 MR. ABRAMOWITZ: Not if he did not know what the
4 maximum sentence was until some time later.

5 THE COURT: Mr. Ferguson already testified that
6 he asked him to file a notice of appeal, and he did.

7 MS. SILVERMAN: Well, that is standard operating
8 procedure in the state courts, your Honor. I want to know
9 when he first got in touch with him concerning his dissatis-
10 faction with the sentence.

11 THE COURT: Right at the time of sentence,
12 according to the testimony we have on the record.

13 MS. SILVERMAN: Apparently that is not the only
14 time, your Honor, because then any subsequent time after
15 that how many times did he get in touch with him.

16 THE COURT: What has that got to do with the
17 question that we have before us now?

18 MS. SILVERMAN: I think what it has to do with
19 the question, your Honor, is whether in fact Mr. Kelleher
20 has made a claim which is worthy of belief; i.e., it seems
21 to me if in fact a man had expected a considerably lesser
22 sentence than he had received, he would have taken prompt
23 and quick action to see that that sentence was in fact
24 vacated.

25 MR. ABRAMOWITZ: Ms. Silverman keeps misconstruing

2 the nature of the claim. Our claim for the third time, is
3 not that he received less than he was promised, or that
4 there was any promise, but at the time he took the plea, he
5 did not know what the minimum or maximum sentence was to the
6 crime to which he pleaded guilty.

7 I press the objection again, your Honor.

8 THE COURT: All right.

9 MS. SILVERMAN: If I may, your Honor, I would
10 like to read from Mr. Kelleher's petition.

11 THE COURT: No, we can read and we have read it.

12 MS. SILVERMAN: It says that he was falsely --

13 THE COURT: I am not going to listen to it.

14 MS. SILVERMAN: I would just like to know --

15 THE COURT: The objection is sustained. Their
16 claim is simply that at the time he made his plea he did
17 not know what the maximum and what the minimum was to the
18 crime of which he was charged.

19 MS. SILVERMAN: With all due respect to the
20 Court and Mr. Abramowitz, your Honor, the petition does not
21 specifically so allege. It states that his attorney fraudu-
22 lently told him he would get 15 years. It is right in the
23 petition.

24 And I would additionally point out that the
25 coram nobis --

2 THE COURT: The coram nobis application is not
3 before me.

4 MS. SILVERMAN: It was submitted to me.

5 THE COURT: It is not before me for decision.
6 That has already been decided by the state court. With all
7 due respect to you, if you insist upon reading things after
8 I have told you you cannot, you will be in trouble.

9 MS. SILVERMAN: Well, your Honor, I would just
10 say one further thing --

11 THE COURT: Do not say anything further on this
12 subject, please. Ask the questions of the witness or sit
13 down.

14 MS. SILVERMAN: Well, your Honor, I have no
15 further questions of this witness.

16 THE COURT: All right.

17 MR. ABFAMOWITZ: Your Honor, I have no redirect.

18 THE COURT: Mr. Ferguson, when you came to
19 Mr. Kelleher with this offer that was made by the District
20 Attorney, did he not ask you any questions: What do you
21 mean, six to 18?

22 THE WITNESS: He was very indignant at the time.
23 He felt, as far as I could observe, he thought it was a
24 tremendously big sentence.

25 THE COURT: What I am trying to get at is, did

2 he express no surprise about the fact that there was a
3 minimum here?

4 THE WITNESS: No. I don't recall that. The
5 only thing I recall was his indignation and his complete
6 lack of interest in taking such plea.

7 THE COURT: As a practitioner for 40 years, you
8 know that under the new rules if you give a minimum, you
9 have to give reasons for giving a minimum?

10 THE WITNESS: Yes, Judge.

11 THE COURT: Did he make any kind of statement
12 about this?

13 THE WITNESS: No, he didn't.

14 THE COURT: None whatsoever?

15 THE WITNESS: No.

16 THE COURT: You did not explain to him that that
17 six is a third of the 18?

18 THE WITNESS: I didn't, because it looked to me
19 that this was going to be a trial, not a negotiation of a
20 plea.

21 THE COURT: All right.

22 If my questions have evoked any others, you may
23 ask.

24 MR. ABRAMOWITZ: I have no further questions,
25 your Honor.

2 MS. SILVERMAN: I have none, your Honor.

3 THE COURT: You may step down.

4 (Witness excused.)

5 MR. ABRAMOWITZ: Your Honor, could I ask for a
6 few minutes' recess to consult with my client? Would that
7 be okay?

8 THE COURT: Surely. We will take a short
9 recess.

10 (Recess.)

11 MR. ABRAMOWITZ: Your Honor, the petitioner
12 calls John Kelleher.

13 J O H N K E L L E H E R, the petitioner herein, being
14 first duly sworn, testified as follows:

15 MR. ABRAMOWITZ: May I proceed, your Honor?

16 THE COURT: Yes, please.

xvx

17 DIRECT EXAMINATION

18 BY MR. AERAMOWITZ:

19 Q Mr. Kelleher, would you please try to keep your
20 voice up so that everybody in the courtroom can hear your
21 answers to my questions.

22 A I will.

23 Q Mr. Kelleher, are you the defendant in an action
24 known as The People of the State of New York against John
25 Kelleher?

2 A I am.

3 Q Which, for the record, was Indictment No. 3446/
4 1971?

5 A Yes.

6 Q Are you the petitioner in this action?

7 A Yes, I am.

8 Q Do you know a Richard Ferguson?

9 A I do.

10 Q When for the first time did you meet
11 Mr. Ferguson?

12 A I believe it was December, early part of
13 December, 1971.

14 Q In what connection did you meet him?

15 A He was assigned counsel.

16 Q What day did the trial start in your indictment,
17 do you recall?

18 A I believe it was the 9th.

19 Q Prior to the 9th of December did you have any
20 conversations with Mr. Ferguson about a possible plea to the
21 indictment to which I referred?

22 A None.

23 Q Starting on December 9th, did you have any conver-
24 sations with Mr. Ferguson about pleading guilty?

25 A No, sir.

2 Q Did you ever have such a conversation with
3 Mr. Ferguson?

4 A No, sir.

5 Q Did you ever communicate to Mr. Ferguson that
6 you wished to plead guilty to the indictment in this case?

7 A Yes, sir.

8 Q Could you tell us, to the best of your recol-
9 lection, when you communicated that to Mr. Ferguson?

10 A It was right after the District Attorney finished
11 his case.

12 Q Could you tell the Court and counsel what you
13 told Mr. Ferguson, to the best of your recollection?

14 A I said, "Let's hang this up."

15 Q Going back a little bit, Mr. Kelleher, did there
16 come a time when Mr. Ferguson communicated to you either
17 during the course of the trial or before the trial or
18 during it, as I said -- did there come a time when
19 Mr. Ferguson communicated to you an offer from the District
20 Attorney with respect to this indictment?

21 A Yes, he did.

22 Q Do you remember when that communication took
23 place?

24 A I was in the bull pen and it was just before we
25 went upstairs, and he come down and he said to me, "The

2 District Attorney wants to know if you're interested in six
3 to 18."

4 Q What did you say, to the best of your recollection?

5 A I says, "You've got to be kidding."

6 Q And I take it, Mr. Ferguson assumed that was a
7 negative response; is that correct?

8 A He must have. He walked away.

9 Q Did there come a time when you actually did
10 plead guilty to the charges in the indictment?

11 A Yes, sir.

12 Q At the time that you pleaded guilty or at any
13 time, either prior to that or after it, before you were
14 sentenced, did anyone, the Court or counsel or the District
15 Attorney or anyone, tell you what the minimum and maximum
16 sentences could be for the crime to which you were going to
17 plead guilty?

18 MS. SILVERMAN: Objection, your Honor.

19 THE COURT: What is the objection?

20 MS. SILVERMAN: The objection is it is leading.
21 I think he should ask Mr. Kelleher what in fact happened at
22 each point.

23 MR. ABRAMOWITZ: I think we did, your Honor.

24 THE COURT: I am going to let him answer the
25 question.

2 Q Please answer the question. Do you want it
3 rearead?

4 A I would like it to be, please.

5 (Question read.)

6 A No.

7 Q Mr. Kelleher, I assume that you recall that you
8 were sentenced on your plea of guilty; do you remember that?

9 A Yes, sir.

10 Q I believe, for the record, the date was
11 January 11, 1972.

12 Do you recall any conversation in open court
13 by your counsel with respect to the minimum or maximum
14 sentence that could be imposed for the crime to which you
15 pleaded guilty on the day of sentence?

16 A No, sir.

17 Q Also, for the record, Mr. Kelleher, Ms. Silverman,
18 in questioning Mr. Ferguson, made some references to some
19 allegations in both your petition for coram nobis in the
20 state court and your petition here concerning the possibility
21 that Mr. Ferguson might have told you that the maximum
22 sentence was 15 years; do you recall making those allegations
23 in the petition?

24 A I'd like to explain that --

25 Q First answer my question. Do you recall making

2 those allegations?

3 A Yes.

4 Q Are those allegations true?

5 A No, sir.

6 Q Will you please explain to the Court and counsel
7 how those allegations came to be in that petition.

8 A Well, the papers that were made up here were
9 made by fellows in the institution that I'm in, and when
10 they went through whatever papers that I had sent for, that
11 they asked me to get and what-not, I gave them the papers.

12 Q Is that allegation a mistake?

13 A Yes, sir.

14 Q When for the first time did you find out that
15 the maximum sentence for the crime to which you pleaded
16 guilty was a minimum of seven years and a maximum of 25
17 years?

18 THE COURT: A minimum of eight and a third to
19 25, counsel.

20 MR. ABRAMOWITZ: Eight and a third.

21 Q When did you find out what the minimum sentence
22 was or the maximum sentence?

23 THE COURT: Assuming he ever did.

24 Q Assuming you ever did.

25 A I found out a lot of things when I got upstate.

2 Q When you say when you got upstate, you are
3 referring to in prison from another inmate; is that correct?

4 A Yes, sir.

5 Q Prior to that time had anybody told you, from
6 any source, that the maximum sentence on the crime to which
7 you pleaded guilty was 25 years?

8 A No, sir.

9 Q Mr. Kelleher, prior to your conviction in this
10 case, had you ever been convicted of any other crime?

11 A Yes, sir.

12 Q Could you tell the Court and counsel what crimes
13 you were convicted of and when.

14 A I was convicted of simple assault and petty
15 larceny in that year -- it would have to be 1963, possibly.

16 Then I had --

17 Q Do you remember the sentence in that connection?

18 A That was 90 days' suspended sentence.

19 Q Any other convictions?

20 A Yes, sir. There was one for attempt robbery 3.

21 That was, I think, in 1964 or '65, and the sentence was
22 five years in reformatory. And I think it was a simple
23 assault and that was a fine of \$350.

24 Q When was that simple assault?

25 A May 1971. April 1971. Somewhere in that area.

2 Q So you recall another conviction for petty
3 larceny in approximately 1969?

4 A Yes, sir. That's right.

5 Q Did you receive any sentence at that time?

6 A Six months.

7 MR. ABRAMOWITZ: No further questions.

8 CROSS-EXAMINATION

9 BY MS. SILVERMAN:

10 Q Mr. Kelleher, you were sitting here when
11 Mr. Ferguson testified, and he indicated that he did not
12 come to represent you until 20 days or so before the trial
13 began. Did you have another attorney prior to Mr. Ferguson?

14 A Yes, ma'am.

15 Q Do you recall who that attorney was?

16 A It was a Mr. Steven Laiefer.

17 Q Laitham?

18 A Laiefer. I believe it was Laiefer.

19 Q Could you spell that, if you can?

20 A Phonetically.

21 Q All right.

22 A L-a-i-e-f-e-r.

23 Q Was he a private attorney retained by you?

24 A He was retained for me.

25 Q Was he going to be paid, is what I meant.

2 A Well, somebody was going to pay him.

3 Q Was there another attorney who also represented
4 you prior to Mr. Laiefer?

5 A Yes, ma'am.

6 Q Who was that? I mean, on this case. Right?
7 With respect to this indictment?

8 A This is what we're talking about.

9 Q Yes, okay.

10 A Fine.

11 Q Who would that be?

12 A Mr. Spynokos.

13 Q Was there any other attorney with respect to
14 this indictment who represented you at any other point in
15 time?

16 A Not that I could recall.

17 Q Was Mr. Spynokos first in time?

18 A Yes, ma'am.

19 Q When did he come to represent you?

20 A I think it was a few days after I was arraigned.

21 Q Three days?

22 A A few.

23 Q A few days?

24 A Don't quote me on the day, now.

25 Q How long did he represent you?

2 A Not long.

3 Q Do you recall how long, more or less?

4 A I think I seen him once.

5 Q Had you retained him yourself?

6 A No, ma'am.

7 Q Who had retained him?

8 A A friend of my family's.

9 Q A friend of the family's.

10 Did you speak with him at any point?

11 A Yes, ma'am.

12 Q Where did you speak to him?

13 A I think it was in the bull pen.

14 Q Was this at your arraignment on the felony?

15 A No, at the arraignment there was a Legal Aid
16 attorney there.

17 Q So then you say you spoke with Mr. Spynokos in
18 the bull pen. Where would that have been, at what point?

19 A I think it was when we went upstairs. I went
20 from the lower -- I had so many appearances in lower court,
21 and Legal Aid was there once, and then this Mr. Spynokos was
22 supposed to be there once, and then I got there and I never
23 got into court.

24 So I don't know who was there, and then somebody
25 come in and said, "You was indicted." Then it must have been

2 upstairs.

3 Q In the Supreme Court?

4 A It wasn't on the second floor, so it was upstairs.

#7

5 Q That would have been your arraignment on the
6 indictment, I take it?

7 A Yes, ma'am.

8 Q So with your arraignment on the indictment you
9 were represented by Mr. Spynokos?

10 A Yes, ma'am.

11 Q You spoke with Mr. Spynokos at this time?

12 A In the bull pen..

13 Q Where did you speak to him in the bull pen?
14 Just in the bull pen?

15 A Right.

16 Q What happened at this arraignment?

17 A He says, "If you plead not guilty, I'll see if
18 I could get a reduction in bail."

19 And that's the last I seen of Mr. Spynokos.

20 Q You never spoke with him after that occasion?

21 A No, ma'am.

22 Q What was your next occasion when you had some
23 sort of interaction with an attorney?

24 A That's when a friend of the family got this
25 Mr. Laiefer.

2 Q How long after or how soon after you last saw
3 Mr. Spynokos would that have been?

4 A A few months.

5 Q On what occasion? Where did you see him?

6 A I seen him once in the Men's House of Detention.

7 Q In the Tombs?

8 A Yes, ma'am.

9 Q And then when did you see him again?

10 A I seen him in court once.

11 Q Yes. That is the second time?

12 A Right.

13 Q Did you see him after that?

14 A Then his partner came the last time and they got
15 off the case.

16 Q Who was his partner?

17 A I don't know his name.

18 Q When would that have been, approximately what
19 month and year?

20 A Just before I got involved with Mr. Ferguson.

21 Q You saw Mr. Laiefer once in the Men's House of
22 Detention?

23 A Yes, ma'am.

24 Q And once in court, I believe you said.

25 A That's right.

2 Q What happened in the Men's House of Detention
3 between you and Mr. Laiefer?

4 A He came in and he told me that him and his --
5 this fellow that was with him was his partner -- was sent
6 down by a friend of mine to represent me; that they would
7 do whatever they had to do to get bail reduction, and they
8 would be back to see me as soon as possible; that they had
9 some other matters or something to take care of and they
10 discussed the possible fee in regards to the case. And they
11 left.

12 Q Did you discuss anything concerning the indict-
13 ment itself?

14 A No, ma'am.

15 Q Then you next saw him in the courtroom?

16 A Yes, ma'am.

17 Q What happened on that occasion?

18 A He tried for a bail reduction and couldn't get it.

19 Q You say you did not see him after that or you
20 saw his partner?

21 A I saw his partner the next time.

22 Q What happened on that occasion?

23 A They asked to get off the case for financial
24 reasons.

25 Q Then Mr. Ferguson came to be your attorney?

2 A That's right.

3 Q When you first met Mr. Ferguson, did you have a
4 discussion concerning your defense as to this indictment?

5 A We spoke.

6 Q Did you indicate to him whether you wanted to go
7 to jail or whether you wanted to take a plea?

8 A I never mentioned a plea.

9 Q You did not mention a plea?

10 A I never did.

11 Q What did you tell him?

12 A I said I was going to trial.

13 Q Then what did he say to you?

14 A He says, "Well, I'm going to put in motions for"--
15 because he questioned me about what had happened with the
16 police department or anything like that, and I answered.

17 Q What had happened with the police department?

18 A He asked me if I said anything when I was with
19 the police department, and I said -- well, I answered him,
20 and then he said that he was going to put in some motions
21 and that he would get back to me because he had something,
22 some business or court matter in the afternoon, and he was
23 gone.

24 Q Then what was the next occasion when you saw him?

25 Was this in the Tombs that you saw him?

2 A Yes, ma'am.

3 Q What was the next time that you saw him?

4 A I think it was either in the Tombs or in the
5 bull pen.

6 Q What transpired on that occasion?

7 A He come in and he said that he had put in a
8 series of motions and that they wanted to go to trial right
9 away and was I ready.

10 And I said, "Let's go."

11 Q You were ready to go to trial?

12 A Yes, ma'am.

13 Q What did you discuss with him in connection with
14 the trial?

15 MR. ABRAMOWITZ: Your Honor, I have to object
16 to that as being irrelevant. If Ms. Silverman is inquiring
17 about a potential defense or the substance of the crime,
18 I think that is irrelevant to this petition.

19 MS. SILVERMAN: May I be heard on that, your
20 Honor?

21 THE COURT: Counselor, no, you have won, so do
22 not be heard.

23 MS. SILVERMAN: I am sorry. I cannot hear you.

24 THE COURT: You have won, so do not be heard.

25 From my standpoint I think this kind of questioning goes to

1 the ability to understand by this particular witness, and I
2 think I am going to let her ask the question to a certain
3 extent.

4
5 MS. SILVERMAN: Could you read back the question,
6 please.

7 (Question read.)

8 A He asked me about any statements that I made,
9 and I answered him on that. And he asked me if I had any-
10 body that I wanted to call in, and I answered him on that.

11 Q Did you tell him? What did you tell him with
12 respect to whether you had anybody to call in?

13 MR. ABRAMOWITZ: Your Honor, I really must press
14 these objections. I understand the focus of your Honor
15 wanting to determine the petitioner's ability to understand,
16 but I think we are getting into an area where the defendant
17 does not wish to waive any privileges with respect to the
18 trial itself, which has nothing to do with this proceeding.

19 THE COURT: I do not see that he is waiving any
20 privileges.

21 MR. ABRAMOWITZ: We are getting very close to it,
22 your Honor. I think that if your Honor would like to hear
23 me outside the presence of the petitioner, I think that might
24 be fruitful. At the side bar.

25 THE COURT: I am going to listen to his answer.

2 THE WITNESS: Could I hear that?

3 MR. ABRAMOWITZ: Read back the question.

4 (Question read.)

5 A I told him I had somebody.

6 Q Did you give him the names of these people?

7 A The names -- not a name like, you know, like my
8 name. Like, you know, my name is here. It wasn't, we'll
9 say, John Kelleher. It was nicknames and that's what I
10 gave him; nicknames. I didn't have the full name of the
11 party.

12 Q Did you give him addresses?

13 A I gave him where they might be found.

14 Q You did?

15 A Roughly.

16 Q Did you ever ascertain whether he had spoken
17 with any of these people?

18 A I said I couldn't locate them.

19 Q Could not locate any of them?

20 A I couldn't.

21 Q I'm sorry?

22 A I said I couldn't locate any of them. I had
23 tried through various means to locate them.

24 Q You had tried. Were you out on bail at this
25 time?

2 A No, ma'am.

3 Q You do recall the trial beginning?

4 A Yes.

5 Q Do you remember a time prior to trial discussing
6 any possible plea arrangement with your attorney?

7 A No, ma'am.

8 Q You do not?

9 A No.

10 Q Do you recall him telling you that Mr. Cryan
11 had offered a plea to the indictment and that you would
12 receive -- he would recommend, in any event, six to 18 years?

13 A I remember that, but I don't remember discussing
14 any possible plea.

15 Q No, no. I mean, did you discuss that with
16 Mr. Ferguson? Do you recall having a discussion concerning
17 a six-to-eighteen year sentence with Mr. Ferguson?

18 A Mr. Ferguson told me about it.

19 Q Right. He did tell you that?

20 A Right.

21 Q When did he tell you that?

22 A In the bull pen.

23 Q Was this before the trial began or after the
24 trial began?

25 A We already started -- we had a hearing there.

2 Q So it was before the trial?

3 MR. ABRAMOWITZ: Does Mr. Kelleher know the
4 difference between the trial and the hearing? I'm not sure
5 he understands the distinction.

6 THE COURT: What was the hearing about,
7 Mr. Kelleher?

8 THE WITNESS: One was called a Wade hearing,
9 but we had already picked the jurors, and --

10 THE COURT: So this was immediately before the
11 trial, then?

12 THE WITNESS: Before they put all the people in
13 the box.

14 THE COURT: Before they put all the people in
15 the box.

16 Q What did he say to you specifically?

17 A He asked me -- he come down and he says,
18 "Mr. Cryan" -- he didn't say "Mr. Cryan," he said, "the
19 DA wants to know if you want six to 18."

20 And I told him, "That's out."

21 Q You said that was out?

22 A "That's out."

23 Q Why was that out?

24 A Because I was going to trial.

25 Q Well, if you were going to trial, what did you

2 think would happen after your trial?

3 A I thought a lot of things at that time.

4 Q What did you think?

5 A Well, I didn't consider taking the plea, so there
6 was no sense of him asking me if I was going to take a plea
7 or not. I had never stated to him that I wanted to take a
8 plea. We never had a discussion about a plea.

9 And when he come down and asked me that, I felt
10 it was off the top of his head and I told him, "That's out."

11 Q "That's out"?

12 A "That's out."

13 Q You thought that was too long a time to serve,
14 or you just did not want to serve any time; wasn't that it?
15 You did not want to serve any time?

16 A I didn't say that.

17 Q Why was six to 18 out?

18 A Is it Miss Silverman?

19 Q Yes.

20 A When I discussed anything with my attorney, I
21 told him I was going to trial. So, therefore, him coming
22 down and telling me anything at all wasn't in what I wanted
23 to do.

24 Q Because you wanted zero, zero to zero in effect;
25 is that it?

2 A I didn't say that.

3 Q Well, if six to 18 was out, what was in,

4 Mr. Kelleher?

5 MR. ABRAMOWITZ: Your Honor, I think he has
6 answered that. At that point he wanted to go to trial and
7 there was no question of what was in our out.

8 THE COURT: I think it is really argumentative.

9 MS. SILVERMAN: I am just trying to find out what
10 options he had in his mind for the six to 18.

11 THE COURT: His option, he said, was that he
12 wanted to go to trial, and he said it about three times.

13 Q What did you think would result after the trial?

14 A I would have went home.

15 Q You would have gone home.

16 A Possibly. It was up to the jury.

17 Q Surely, Mr. Kelleher, you realize that you might
18 also be convicted if you went to trial?

19 A That's a possibility.

20 Q So you were willing to face that possibility?

21 A That's what the trial was all about.

22 Q You felt you had a good defense to the charges?

23 A At the time, I did.

24 Q Well, what was your defense in view of the fact
25 you just told us that none of the witnesses could be located?

2 MR. ABRAMOWITZ: Your Honor, I really must
3 object.

4 THE COURT: Yes, I am going to sustain it.

5 MS. SILVERMAN: I am sorry, your Honor. What is
6 the objection?

7 MR. ABRAMOWITZ: It is irrelevant.

8 MS. SILVERMAN: It is irrelevant? I'm sorry.

9 MR. ABRAMOWITZ: His Honor has ruled.

10 THE COURT: What his defense would be is
11 completely irrelevant. Completely irrelevant. I have gone
12 along with this line of questioning on the basis of his
13 understanding, but that is the only basis. In other words,
14 for you to show that he knew what he was doing up to this
15 point.

16 MS. SILVERMAN: I guess the only point I was
17 trying to make, your Honor, was that if he was offered the
18 plea of from six to 18 and did not take it, he must have
19 known that he would face at least that if he went to trial,
20 and he just told us that he had no defenses. Therefore, why
21 did he still want to go to trial? I think it shows something
22 about --

23 THE COURT: He has not told us that he did not
24 have any defenses.

25 MR. ABRAMOWITZ: Thank you.

2 MS. SILVERMAN: He did, I think, tell us that
3 none of his witnesses could be located.

4 THE COURT: That is a different thing, a
5 different thing.

6 MS. SILVERMAN: All right.

7 Q So Mr. Ferguson came to you and he mentioned
8 six to 18, and you told him it was out?

9 A Yes, ma'am.

10 Q Then I believe the trial proceeded.

11 A Yes, ma'am.

12 Q And at some point during that trial, what
13 happened? What happened? Did you at some point change your
14 mind and decide to plead guilty?

15 A Yes.

16 Q At what point was that?

17 A It was right after the District Attorney said
18 that the state had presented their case.

19 Q What did you say to Mr. Ferguson at that point,
20 if anything?

21 A I said, "I think we better hang this up."

22 Q "Better hang this up." What did Mr. Ferguson
23 say to you?

24 A He looked at me, he got up, and he went to the
25 bench. He asked the Judge could they go to the bench. Him

2 and the District Attorney went to the bench.

3 Q Did you at that point ask Mr. Ferguson what
4 sentence you would receive if you hung it up?

5 A No, ma'am. He walked from the table to the bench.

6 Q But you never at any time asked Mr. Ferguson --

7 A No.

8 Q -- what the sentence was that you would receive?

9 Did you think you were going to go to jail if
10 you took a plea to guilty?

11 A Yes, ma'am.

12 Q Well, when you took this plea to guilty, you
13 thought you were going to go to jail, how long did you think
14 you were going to go to jail for?

15 A No idea.

16 Q You originally did not want to take the plea
17 because you did not want 16 to 18, right?

18 MR. ABRAMOWITZ: Six to 18.

19 Q I am sorry, six to 18.

20 MR. ABRAMOWITZ: I object to the form of that
21 question.

22 Q Well, you did not take an offer of six to 18
23 previously made?

24 A No, I didn't.

25 Q Right. So now you say that you were willing to

2 plead to the indictment or willing to take a plea, anyway,
3 at that point, and at that point if you took the plea, did
4 you think you were going to go to jail?

5 MR. ABRAMOWITZ: It has been asked and answered,
6 your Honor.

7 THE COURT: I sustain the objection.

8 Q How much time did you think you were going to
9 have to spend in jail?

10 A I had no idea at that moment.

11 Q You had no idea. Did you ask anybody?

12 A There was nobody to ask.

13 Q Well, Mr. Ferguson was there.

14 A Mr. Ferguson was at the bench.

15 Q Well, Mr. Ferguson was near you, though, when
16 you turned to him and told him that you wanted to, I think
17 you said, hang it up. Did you at that point ask him what
18 sentence you faced?

19 A No, because Mr. Ferguson left the bench and went
20 up -- he asked the Judge could he see the Judge, and him and
21 the District Attorney walked up and spoke to the Judge.

22 Q Then what happened?

23 A Then I took the plea.

24 Q Well, did Mr. Ferguson come back to you?

25 A He was standing next to me when I stood up and

2 took the plea.

3 Q Well, after Mr. Ferguson went up and spoke to the
4 Judge in the presence of Mr. Cryan, did he then come back
5 and talk to you?

6 A Yes, he did.

7 Q He did?

8 A He did.

9 Q What did he say to you at that point, then,
10 Mr. Kelleher?

11 A He said that, "This is all" -- to the best of
12 my recollection, he says, "This is the indictment and you've
13 got to say yes to everything."

14 Q Did you at that point ask him what the sentence
15 would be?

16 A No, ma'am, because the Judge started to talk to
17 him.

18 Q But Mr. Ferguson testified that he told you that
19 there would be some consideration. So then you have no
20 recollection of that particular conversation with
21 Mr. Ferguson?

22 A No.

23 Q So that you have no recollection of ever being
24 told that there might be some consideration?

25 A Yes, I do.

2 Q If you do, where did you get such a recollection?

3 A When Mr. Ferguson came to see me in the Tombs
4 after I already took the plea.

#9

5 Q Oh, so it was after the plea. I see. Okay.

6 I have here a copy of the motion you made in
7 the New York County Supreme Court pursuant to Section 4410
8 of the CPL, which I presume you have seen, and in which you
9 state, and I quote:

10 "Mr. Ferguson (like Cowen's attorney Steinbock)
11 instructed petitioner Kelleher to answer that there had been
12 no deals made."

13 Is that what you were so instructed by your
14 attorney, to say that there had been no deals made?

15 A I would like to be able to see that.

16 MR. ABRAMOWITZ: Could we mark it, please?

17 MS. SILVERMAN: It has already been submitted,
18 but this is my copy.

19 THE COURT: You have a copy?

20 MR. ABRAMOWITZ: I just want to make sure that
21 the record is clear as to which petition we are talking about.

22 THE WITNESS: What was your question?

23 THE COURT: Would you like to mark that,
24 Ms. Silverman? Let us mark it.

25 (Respondent's Exhibit A marked for identification.)

2 Q Mr. Kelleher, this is your coram nobis appli-
3 cation, and you made the statement; is that not true?

4 A I signed the paper.

5 Q You signed the paper?

6 A Right.

7 Q And this is your coram nobis application, and
8 you made this statement?

9 MR. ABRAMOWITZ: There are three questions in
10 there, your Honor. So I object to the form of the question.

11 Q This is your coram nobis application, a copy of
12 it?

13 A Yes, ma'am.

14 Q And you signed it?

15 A Yes, ma'am.

16 Q And it contained this statement, that
17 Mr. Ferguson instructed petitioner Kelleher to answer that
18 there had been no deals made?

19 A That's what it says there.

20 Q Right. You signed it, and is it true? Did
21 Mr. Ferguson tell you that?

22 A Again, I had somebody write that, and there was
23 no deals made -- it's a little confusing to me because he
24 told me, "You've got to say yes to everything," so --

25 Q Did he tell you to answer that there had been no

2 deals made?

3 MR. ABRAMOWITZ: In those words, your Honor; is
4 that the question?

5 MS. SILVERMAN: Those are the words, yes.

6 THE COURT: Those are the words.

7 Q Did Mr. Ferguson tell you that, to say that there
8 would be no deals made?

9 A No.

10 Q So that when you signed this, this was untrue?

11 A Well --

12 MR. ABRAMOWITZ: Your Honor, I object to that.
13 I think he has explained what Mr. Ferguson told him, and I
14 do not want to argue now as to the significance of the
15 difference between the two statements.

16 MS. SILVERMAN: If Mr. Abramowitz does not want
17 to argue it --

18 Q Do you read English?

19 MR. ABRAMOWITZ: Your Honor, I object to that.

20 MS. SILVERMAN: I am sorry, I do not know why
21 it is objected to.

22 MR. ABRAMOWITZ: Your Honor, Mr. Kelleher has
23 testified that Mr. Ferguson told him to answer yes to all the
24 questions, and Ms. Silverman is asking him did he use those
25 words that are in the petition. He said he did not use

2 those words.

3 The issue as to whether one is true and one is
4 not true is argumentative and, therefore, not a proper
5 question to the witness, so I press my objection.

6 MS. SILVERMAN: I would simply say, what is at
7 issue here is whether he is in fact telling us the truth
8 today. And his inclination to sign statements which if he
9 can read English, and I was not allowed to ask him that
10 question, whether he would or would not sign questions I
11 think should be relevant.

12 MR. ABRAMOWITZ: The argument is whether the
13 difference between what Mr. Kelleher said on the witness
14 stand and what is in the petition is true or not true is a
15 legal argument and not one for Mr. Kelleher to answer.

16 THE COURT: I won't sustain your objection to the
17 question as to whether he can read English, but I won't
18 permit you to follow along this line, because it is a
19 question of semantics. It is a question of what he has told
20 somebody and somebody else has written into his petition.

21 MS. SILVERMAN: Your Honor, I do not think it
22 becomes a question of semantics if he can read English and
23 reads it before he signs it. It seems to me that goes to the
24 very heart of whether or not he is a credible witness.

25 THE COURT: As long as you are on that line of

2 questioning, you can ask him about his background and his
3 education.

4 MS. SILVERMAN: I just wanted to ask him --

5 THE COURT: No, you started it and I am telling
6 you, ask him.

7 Where did you go to school, Mr. Kelleher?

8 THE WITNESS: I went to the St. James Grammar
9 School in Manhattan.

10 THE COURT: How far did you get in school?

11 THE WITNESS: Eighth grade.

12 THE COURT: Eighth grade. You did not go any
13 further than that?

14 THE WITNESS: One year high school.

15 THE COURT: One year in high school. What
16 happened in high school?

17 THE WITNESS: I quit.

18 THE COURT: How old were you when you quit?

19 THE WITNESS: Sixteen, just enough to go to work.

20 Q Do you read English?

21 A Yes, ma'am.

22 Q Did you read the petition before you signed it?

23 A Well, I went through it and I signed it.

24 Q So you signed it?

25 A Yes.

2 Q Well, then is it true you read this statement,
3 and was it true?

4 A Miss, I read the whole paper when it was all
5 together. There was a stack of papers to be signed in front
6 of the notary. The fellow --

7 MR. ABRAMOWITZ: I object and ask for a ruling.

8 THE COURT: The answer to the question is yes,
9 it was true.

10 MS. SILVERMAN: That was my question. If it is
11 objected to and sustained, of course, I will pass on to some-
12 thing else, your Honor.

13 Q You testified that at the time after the People
14 finished their case that you then turned to your attorney
15 and said that you wanted to take a plea, or indicated to him
16 in so many words that you wanted to take a plea; that he
17 then came back to you, he then went up to the bench and spoke
18 with the Judge, and then came back to speak with you?

19 A Yes, ma'am.

20 Q What did he say to you at that point?

21 A He said, "When the Judge -- the Judge is going
22 to ask you questions, and you have to answer all the questions
23 that he asks you. And if it's pertaining to the incident,
24 you have to say yes or no. Since this is the whole thing
25 all together, you've got to say yes."

2 Q When he was there before you, did you ask him,
3 "Did the Judge say anything about sentencing, or time of
4 sentence that I might have to serve?"

5 A No, ma'am.

6 Q Did you ask him if the District Attorney said
7 anything?

8 A No, ma'am.

9 Q You knew at that time, I assume, that you were
10 going to have to go to jail if you took a plea?

11 A I think I answered that.

12 MR. ABRAMOWITZ: Asked and answered.

13 THE COURT: It has been asked and answered.

14 Q I have here your federal petition for a writ of
15 habeas corpus. Did you prepare this petition?

16 A No, ma'am.

17 Q Who prepared it for you?

18 A Mr. Frank Bloethe.

19 Q Have you read it?

20 A Yes, ma'am.

21 Q Do you recall this statement:

22 "Parenthetically, relator, who had been earlier
23 falsely told by his counsel that if convicted on the attempted
24 murder count he could receive a possible maximum sentence of
25 up to 15 years, would not have pleaded guilty" -- and then it

2 goes on -- "had he been informed that the maximum sentence
3 on the count was in fact 25 years."

4 A I was never told that.

5 MR. ABRAMOWITZ: I did not hear the answer.

6 A I was never told it was 25 years.

#10 7 Q I did not ask you that. I asked you if you
8 recalled the statement in the petition.

9 MR. ABRAMOWITZ: May I suggest that Ms. Silverman
10 show it to him, please?

11 MS. SILVERMAN: Yes, that is perhaps the easiest.
12 It is underlined.

13 THE WITNESS: Thank you.

14 Q Do you recall reading the statement and that
15 sentence in particular?

16 A That's right.

17 Q You recall that?

18 A Yes.

19 Q So that --

20 MR. ABRAMOWITZ: Your Honor, I do not mean to
21 interrupt Ms. Silverman. May we mark that Respondent's
22 Exhibit B?

23 THE COURT: It is the petition.

24 MR. ABRAMOWITZ: But we marked the state coram
25 nobis petition Respondent's Exhibit A. I would like to mark

2 this Respondent's Exhibit B.

3 THE COURT: Is it in evidence. It is before me.

4 MR. ABRAMOWITZ: I just wanted to make sure we
5 are distinguishing.

6 Q So you recall the statement? Then in fact your
7 attorney did falsely tell you that you could get 15 years?

8 A When I spoke to this attorney after the --
9 a lot of this is after I already took the plea. He come in
10 and he said something, "That you could get" -- he might have
11 said the 15 years. I remember the 15 years. He said 15
12 years somewhere, but I don't really remember where it was.

13 These fellows, when they write this stuff, they're
14 trying to help you. I've got no trouble trying to disbelieve
15 the guy in the law library, in jail just like I am. He's
16 got no reason to put something down --

17 Q I take it you submitted a state coram nobis
18 petition, a federal coram nobis petition, in which you swore
19 this was the truth. And you're now telling me you have no
20 idea what is in this paper, and if it is good for you, it
21 is good for you, if it is bad for you, it is bad for you.

22 MR. ABRAMOWITZ: I object to the form of the
23 question.

24 THE COURT: It is not a question, it is a state-
25 ment.

2 MR. ABRAMOWITZ: I object.

3 THE COURT: Sustained.

4 Q You read this before you signed it?

5 A I read it.

6 Q And you signed it?

7 A I signed it.

8 Q Under oath?

9 A I signed it that that was me, yes.

10 Q In the presence of a notary you swore that this
11 was an affidavit, that this was the truth, what was in this
12 statement?

13 A I said that I was signing it, yes.

14 Q So then, this is true, that your attorney
15 falsely told you that you would receive a possible maximum
16 sentence of up to 15 years?

17 A Well, when -- he mentioned the 15 years somewhere,
18 but I don't really remember where it was. But I remember him
19 mentioning 15 years somewhere.

20 Q So then, at some point he did discuss sentence
21 with you?

22 A I'm trying to explain -- well, you say sentence.
23 I'm thinking of -- well, he mentioned 15 years.

24 Q When did he mention, Mr. Kelleher?

25 A I think it was -- I'm not sure if it was the day

2 I got sentenced or not. I'm really not sure. I heard the
3 figure somewhere. It just didn't come out of the air.

4 Q Why did you change your mind and decide to plead
5 guilty at the close of the People's case?

6 MR. ABRAMOWITZ: Your Honor, I object.

7 THE COURT: Sustained.

8 Q After your plea did you expect to go home?

9 MR. ABRAMOWITZ: Your Honor, it has been asked
10 and answered. I object.

11 THE COURT: I think so.

12 MS. SILVERMAN: Your Honor, if I may, it seems to
13 me I think we are entitled to know what was going on in this
14 man's mind, because he is claiming he did not have knowledge.
15 The man has admitted three or four prior convictions --

16 THE COURT: Your arguments are useless because I
17 have already sustained the objection. It has been asked
18 and answered.

19 Q Did you expect to serve any time in a state
20 prison?

21 THE COURT: He has answered that.

22 MS. SILVERMAN: I am sorry, your Honor. I do
23 not recall him answering it.

24 THE COURT: I am sorry you do not remember asking
25 questions.

2 MS. SILVERMAN: Well, I tried to get an answer
3 several times. Was his answer then, no?

4 THE COURT: His answer was yes, he expected to
5 serve time.

6 Q How much time did you expect to serve?

7 MR. ABRAMOWITZ: Asked and answered. I object.

8 THE COURT: He said he had no idea, and this is
9 the fourth time he has answered that question.

10 Q So was it then that you did not care how much
11 time you had to serve?

12 A I didn't know, you know, what it was going to be.

13 Q And you did not care? I mean, you did not ask
14 anybody?

15 MR. ABRAMOWITZ: Your Honor, I object. It is
16 a characterization.

17 THE COURT: Sustained.

18 Q Did you ask anybody?

19 MR. ABRAMOWITZ: When?

20 A When I got upstate.

21 Q No. Did you ask anybody prior to the plea or
22 immediately preceding the plea?

23 A Well, Ms. Silverman, like I explained to you
24 before, when I spoke to the attorney and I told him --

25 THE COURT: You are not answering the question.

2 Just answer her question.

3 MR. ABRAMOWITZ: Would the reporter read back the
4 question, please.

5 THE COURT: Read back the question.

6 (Question read.)

7 A No.

8 Q No?

9 A No.

10 Q Okay.

11 When did you discover the maximum possible
12 sentence, if you did find out, that you faced upon this plea
13 to the attempted murder charge?

14 A When I got to Sing Sing.

15 Q At Sing Sing?

16 A Yes, ma'am.

17 Q What did you find out at that time?

18 A That I could have got 25 years.

19 Q I'm sorry, I cannot hear you.

20 A I could have received 25 years.

21 Q 25 years?

22 A Yes, ma'am.

23 Q What did you do when you learned that?

24 A I asked if anybody could explain a lot of this
25 to me.

2 Q Did anybody explain what to you?

3 MR. ABRAMOWITZ: Your Honor, I am reluctant to
4 object. I think we are really losing focus of what was
5 in the petitioner's mind at the time of the time he took the
6 plea, and what he learned afterwards is really irrelevant.

7 MS. SILVERMAN: I think that when he first raised
8 the claim that there was something in this that was relevant.
9 It would seem to me someone who was damaged, if he feels he
10 is damaged, I think the more promptly he raises it, the more
11 credible is his claim.

12 THE COURT: That is stretching it a long way.

13 MS. SILVERMAN: I think there are cases along
14 that line, your Honor, that support that proposition, but
15 that is certainly my recollection of them.

16 THE COURT: I am going to sustain the objection.

17 Q When did you first raise the claim? When did
18 you first challenge your guilty plea?

19 A It was in Auburn.

20 Q I'm sorry?

21 A In Auburn.

22 Q When would that be? How long were you at Sing
23 Sing?

24 MR. ABRAMOWITZ: I have to object. I'm sorry I
25 did not object to the previous question. These things are

2 matters of public record, when things were filed, and the
3 documents speak for themselves. I object.

4 THE COURT: I sustain the objection.

5 Q Mr. Kelleher, you have spent time in state prison?

6 A Yes, ma'am.

7 Q How much time in state prison?

8 A I've been there since I got --

9 Q No, I'm sorry. Prior to this indictment.

10 THE COURT: That was not a state prison sentence,
11 as I understand it. It was a reformatory. It is a refor-
12 matory sentence. There is a distinction.

13 MS. SILVERMAN: I should have said within the
14 state correctional system.

15 MR. ABRAMOWITZ: Your Honor, I object on relevance.

16 THE COURT: How long were you in?

17 THE WITNESS: 30 months.

#11 18 Q You spent 30 months in Elmira?

19 A Yes, ma'am.

20 Q Were you paroled from Elmira?

21 A Yes, ma'am.

22 Q How long did you spend in Elmira prior to your
23 parole?

24 A 30 months.

25 Q And then you were paroled. Did you violate?

2 A Pardon me?

3 Q Did you violate your parole?

4 A Yes, ma'am.

5 Q Then there came a time that you returned to
6 Elmira?

7 A Yes, ma'am.

8 Q Then how much more time did you spend in Elmira?

9 A I think it was five months.

10 Q Then what happened?

11 A I went home.

12 Q Were you ever arrested on any prior murder charge?

13 MR. ABRAMOWITZ: I object to the question, your
14 Honor. Calling for a question about arrest has nothing to
15 do with the issues in this case.

16 THE COURT: I will let her ask the question.

17 MR. ABRAMOWITZ: Do you want to read the question?

18 THE COURT: Were you ever arrested on any prior
19 murder charge?

20 THE WITNESS: I was arrested for homicide.

21 MS. SILVERMAN: I am sorry, I should have said
22 homicide, your Honor.

23 THE COURT: Homicide. All right.

24 Q You were. What year was that?

25 A I think it was '62 or '63.

2 MR. ABRAMOWITZ: Your Honor, I have to move to
3 strike. Questions about arrest are impermissible and are not
4 permitted to be asked unless they resulted in a conviction.

5 MS. SILVERMAN: Well, your Honor, I think he is
6 talking in terms of asking that question with respect to
7 impeaching someone's credibility. I am asking it with the
8 extent of exploring any prior knowledge he may have had,
9 discussions with attorneys. If he was arrested on a prior
10 charge, I think it could not be more relevant.

11 MR. ABRAMOWITZ: I have to move to strike the
12 question about arrest. Ms. Silverman can ask questions
13 about whether he had heard what the sentence was prior to
14 1971 from any source and in any connection, but I think it
15 is prejudicial to ask with particular reference to the con-
16 nection of arrest.

17 THE COURT: It is not going to prejudice me. I
18 am going to let it stand.

19 Now, in connection with that particular arrest,
20 did anyone ever advise you as to what the possible sentence
21 could be?

22 THE WITNESS: That wasn't the indictment.

23 THE COURT: You were arrested?

24 THE WITNESS: Right.

25 THE COURT: Were you represented by counsel in

2 conjunction with the arrest?

3 THE WITNESS: Yes.

4 THE COURT: Did you ever discuss with that counsel
5 the possible sentence that you might get if it went through
6 to an indictment?

7 THE WITNESS: He told me if I pleaded guilty
8 I'd get five years.

9 Q Who was that counsel?

10 A Mr. Rodriguez.

11 Q Do you remember his first name?

12 A Eugene.

13 Q What ultimately happened to that?

14 A I got five years.

15 Q You took a plea?

16 A I don't know how you put it together, but I went
17 to jail for five years. I pleaded guilty to attempt robbery
18 and that was the end of that other case.

19 Q So, in other words, the arrest was for a homicide
20 but it was disposed of by a plea to attempted robbery in the
21 third degree, I think you said?

22 A Well, if I could explain that. You say homicide,
23 but that's what I was arrested for. And when they came back
24 from, it was, the grand jury, I think, it was assault in the
25 second degree; and when I went to Elmira, it was with -- I

2 had pleaded guilty to attempt robbery 3 and I never heard
3 nothing more about the other one.

4 Q The arrest on the homicide was separate from the
5 arrest which led to your incarceration in Elmira?

6 MR. ABRAMOWITZ: That may not be true.

7 MS. SILVERMAN: I am asking him whether it is or
8 it is not.

9 THE COURT: I do not think it is relevant.

10 MS. SILVERMAN: All right. It may not be. I
11 was trying to set the record straight, your Honor.

12 Q So you spent 30 months at Elmira?

13 A Yes, ma'am.

14 Q While at Elmira, did you meet or have occasion
15 to speak with any other inmates at Elmira?

16 A Yes, ma'am.

17 Q Did you meet anybody there who was serving a
18 murder or homicide charge?

19 A Yes, ma'am.

20 Q So, Mr. Kelleher, I take it, then, that you spent
21 I guess close to three years in Elmira?

22 A Right.

23 Q You were in the Criminal Court in 1963, you took
24 a plea to assault in the third degree?

25 A Yes, ma'am.

2 Q There are various other things that you pleaded
3 to, I think, or at least you were convicted of, you mentioned,
4 and during all this time, you, who had been before the
5 courts on several occasions, been represented, I gather, at
6 various times by different attorneys, never mentioned or
7 never asked anybody what the maximum sentence would be on a
8 plea to murder, attempted murder; is that your testimony?

9 A Yes, ma'am.

10 Q Did you know, Mr. Kelleher, what the sentence was?

11 A No.

12 Q You did not know?

13 A No.

14 Q But it is a fact, Mr. Kelleher, that it must be
15 18 years because had Mr. Ferguson told you earlier that
16 Mr. Cryan had mentioned a sentence of six to 18 years -- I
17 meant to say six to 18. Did I say that?

18 MR. ABRAMOWITZ: I think it is confusing.

19 MS. SILVERMAN: I will withdraw that question.

20 Q You had been told, though, at some point, that
21 the sentence was offered of from six to 18 years?

22 A Yes, ma'am. I said that before.

23 Q So that you knew that 18 years is a possible
24 sentence for this crime, didn't you? You certainly knew that?

25 A That's what they were offering.

2 Q So then you knew it?

3 MR. ABRAMOWITZ: Your Honor, it has been asked
4 and answered.

5 THE COURT: I think it is fairly obvious, yes.

6 MS. SILVERMAN: I have no further questions,
7 your Honor.

8 MR. ABRAMOWITZ: No questions, your Honor.

9 THE COURT: All right. You may step down.

10 (Witness excused.)

11 MR. ABRAMOWITZ: Your Honor, the petitioner rests
12 with this caveat: I did not know until today that
13 Mr. Kelleher had been represented specifically by two named
14 attorneys. I have not had an opportunity to obviously inter-
15 view them. I do not know that their testimony will be
16 relevant.

17 I have a feeling from Mr. Kelleher's testimony
18 that it would not be relevant, and I would like to rest with
19 this condition: That if your Honor asks me, as an officer
20 of the Court, to try to locate those attorneys, and I could
21 represent to you if I do find them whether they would have
22 relevant testimony or not, we could reopen the hearing. I
23 doubt it, and, therefore, I am resting with that condition.

24 THE COURT: All right.

25 Ms. Silverman?

2 MS. SILVERMAN: I have no objection. I was
3 going to ask the Court for an opportunity to try and locate
4 them myself. If Mr. Abramowitz does locate them I would
5 also like just their name and number, and I would probably
6 like a likewise effort.

7 THE COURT: I do not like these things to go on
8 too long as far as I am concerned.

9 MR. ABRAMOWITZ: Your Honor, I believe personally
10 the testimony of Mr. Ferguson is the most relevant, because
11 it deals with the time of the plea. If the Attorney General
12 is going to take the position that there is a gap in the
13 testimony because we have not produced the two prior
14 attorneys who could have told him, and though Mr. Kelleher
15 has testified that they did not tell him, I am just reluctant
16 to waive any rights of my client unwittingly without knowing
17 what these attorneys would say.

18 THE COURT: The problem is here, as far as I am
19 concerned, your client has been brought out of a state
20 correctional institution, and I do not want to be in a
21 position where I am going to keep him at West Street. I
22 would prefer sending him back to the state correctional
23 facility.

24 We needed him, and we will need him again if you
25 are going to reopen this thing.

#12

2 ME. ABRAMOWITZ: Your Honor, I doubt that I
3 would want to reopen it. I could do this: I could inter-
4 view the attorneys. I could let your Honor know what their
5 testimony would be, if this is agreeable with the Attorney
6 General, and perhaps --

7 THE COURT: And let her know at the same time.

8 MR. ABRAMOWITZ: That is correct. If we disagree
9 at that point as to the significance of their testimony,
10 then we could apply to your Honor to reopen the hearing.

11 MS. SILVERMAN: I had spoken with Mr. Cryan
12 prior to this case, and I hoped to have him here to testify
13 tomorrow, because he had spoken to Mr. Ferguson, of course.

14 He is up in Buffalo. He is trying a case with
15 the Attica defense, I guess the prosecution team up there,
16 and he is going to be in the city tomorrow. And I told
17 him that I would like to have him testify. I still feel
18 that way because he had had discussions with Mr. Ferguson,
19 which might throw some light on this thing.

20 MR. ABRAMOWITZ: I do not think, unless Mr. Cryan
21 had a conversation with Mr. Kelleher, that Mr. Cryan's
22 testimony would be relevant.

23 THE COURT: What Mr. Cryan's conversations with
24 Mr. Ferguson might be would have nothing to do and could not
25 in any way be binding upon Mr. Kelleher.

2 MS. SILVERMAN: I think that is true, your Honor.
3 The only thing, I do think it sheds light on whether
4 Mr. Ferguson was telling the truth as to what he had told
5 his client. If he made certain statements to Mr. Cryan,
6 number one; number two, I do not know that the defendant was
7 not present during those conversations.

8 I really have not had a chance, because he has
9 been up in Buffalo, to go over it with him, and I had asked
10 him to be here tomorrow afternoon, if your Honor could take
11 his testimony, at 1:00 o'clock.

12 THE COURT: I would not be available at 1:00
13 o'clock.

14 MR. ABRAMOWITZ: Neither would I, your Honor.

15 THE COURT: Why don't you discuss it with him
16 further, find out what he has to testify to, and we will
17 bunch him in with whatever problems we may have along the
18 line.

19 MS. SILVERMAN: What do you want to do, should
20 we keep the petitioner down?

21 THE COURT: No, I am going to send the petitioner
22 back to the correctional facility.

23 MS. SILVERMAN: Then if we have Mr. Cryan come in,
24 he will have to come back again.

25 THE COURT: If you have, as a result of

2 Mr. Abramowitz' investigation, a possibility that someone
3 else will have to be called in -- after all, Mr. Cryan
4 undoubtedly spoke to these other lawyers --

5 MS. SILVERMAN: All right.

6 THE COURT: What I am saying here is: You know,
7 the records of the courts have been available to you, and
8 we should have had the names, the addresses, the whole bit
9 with reference to these two other attorneys. There is no
10 excuse for Mr. Cryan not being here unless he is actually
11 engaged.

12 MS. SILVERMAN: He is on trial. He picked a
13 jury Monday. As a matter of fact, he is on trial right now.
14 I mean, I was lucky my secretary called him lunch time,
15 otherwise I would not have that information to convey to you.

16 He is engaged on trial and he is up in Buffalo,
17 and he is going to come in tomorrow.

18 And as I said, whether these other attorneys
19 have relevant information or not, I still think Mr. Cryan
20 has relevant information because of his discussions with
21 Mr. Ferguson, and I feel that there is also --

22 THE COURT: Unless you can tell me that
23 Mr. Cryan was present with Mr. Kelleher and Mr. Ferguson,
24 I would not accept the testimony.

25 MS. SILVERMAN: Well, I cannot represent that

2 now since I have not discussed it with him at length. But
3 as I said, I would think that Mr. Ferguson's credibility is
4 also in issue here, and I should think if Mr. Cryan could
5 shed some light or shed any light on that, it would be quite
6 relevant.

7 In any event, I could speak further with
8 Mr. Cryan. I told him I would call him around 5:15. I
9 think he gets through at 5:00.

10 THE COURT: You find out if he knows anything
11 about this or had any conversations in the presence of the
12 defendant.

13 MR. ABRAMOWITZ: Your Honor, may I request,
14 under the Criminal Justice Act, a copy of the minutes? I
15 am not requesting them on a daily basis.

16 THE COURT: Yes, you may.

17 MR. ABRAMOWITZ: Thank you, your Honor.

18 THE COURT: We will adjourn it without date,
19 and when I have had the report from Mr. Abramowitz, and he
20 will give a copy to you or give you information with
21 reference to the other two attorneys, then we may find it
22 necessary to reschedule. If we do, we will have Mr. Kelleher
23 brought back again.

24 MR. ABRAMOWITZ: If not, we will set a schedule
25 for briefs at that point.

2 THE COURT: We will set a schedule for briefs at
3 that time. In the meantime, I think it is best to adjourn
4 it without date. You will have an opportunity to talk to
5 Mr. Cryan and find out what he knows.

6 MS. SILVERMAN: Thank you, your Honor.

7 MR. ABRAMOWITZ: Thank you, your Honor.

8 (An adjournment was taken sine die.)

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1 WITNESS INDEX

2	<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
3	Richard J. Ferguson	4	10		
4	John Kelleher	36	43		
5					
6					

7 EXHIBIT INDEX

8	<u>Respondent</u>	<u>In</u>	
9		<u>Identification</u>	<u>Evidence</u>
10	A	62	
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			